FILE COPY

No. 517

IN THE

Supreme Court of the United States

October Term, 1958

WINNEBAGO TELEVISION CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,
RADIO WISCONSIN, INC., and
GREATER ROCKFORD TELEVISION, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reported at 258 F.2d 163, is printed as an appendix hereto. The basic decision of the Federal Communications Commission (R. 792-802) is reported at 22 FCC 356, and its decision denying rehearing (R. 869-873) at 23 FCC 53.

JURISDICTION

The judgment of the court below, affirming the Commission, was entered on July 2, 1958. By Order of the Chief Justice dated September 19, 1958, the time for filing a petition for a writ of certiorari was extended to

November 14, 1958, pending action by this Court on petitions for certiorari in Nos. 235 and 242 (Oct. Term, 1958). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 47 U.S.C. Sec. 402(j).

QUESTIONS PRESENTED

1. Whether principles enunciated by this Court in the *Chenery* case were incorrectly applied by the court below—in a proceeding instituted by the Commission for the purpose of determining as *a factual matter* whether the deletion of a VHF channel allocated to a given market would result in more service rather than less service (47 U.S.C. Sec. 303(g)) and where a key vote in the Commission's subsequent 4-3 refusal to deintermix that market was predicated on an erroneous *legal* interpretation of 47 U.S.C. Sec. 307(b).

2. Whether a court is in a position to discharge its responsibility of determining whether basic policies which Congress has set forth in the governing statute are or are not being effectuated by the Commission, where the agency decision ignores relevant public interest considerations, where the conclusions do not rationally flow from the findings made, and where the result is patently and unexplainably inconsistent with the decisions of a different majority of the Commission in related proceedings decided the same day.

3. Whether this Court, in view of its actions vacating the judgments of the court below in related deintermixture cases (Nos. 235 and 242), should likewise vacate the instant judgment, inasmuch as these several proceedings were all instituted by the Commission on the same day (June 26, 1956), decided by the Commission the same day (March 1, 1957), and (by reason of their close legal and factual interrelationship) should be reconsidered by the Commission at one and the same time.

STATUTES INVOLVED

Sections 303(g) and 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)) provide:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .
>
> Sec. 307 (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

Realizing that 12 channels were insufficient to provide a nationwide competitive television system, the Commission in its Sixth Report released April 14, 1952, added 70 ultra-high frequency channels (UHF channels 14 through 83) to the 12 very high frequency channels (VHF channels 2-13) theretofore utilized for television broadcast purposes.[1] The Commission further concluded in its Sixth Report, in assigning specific channels to designated communities (see 1 RR 53:606), that the VHF and UHF channels should be "intermixed" (i.e., that some VHF and some UHF channels should be assigned to each major market to the extent possible), on the premise that such an allocation system would compel the manu-

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[1] See Sixth Report of April 14, 1952, 1 Pike & Fisher, *Radio Regulation*, Pt. III, p. 91:664 (para. 197), hereinafter cited as — RR —.

facture of nothing but all-channel receivers and that the new UHF channels would thus become in due course "an integral part of a *single*, nationwide television service."[1]

Pursuant to the intermixture policy thus utilized in its Sixth Report, the Commission on April 14, 1952 allocated VHF Channel 13 and UHF Channel 39 to Rockford, Illinois for commercial use. In like fashion, the Commission allocated VHF Channel 3 and UHF Channels 27 and 33 to Madison, Wisconsin.[2] Madison is some 50 miles northwest of Rockford.

Petitioner, Winnebago Television Corporation, obtained a grant on UHF Channel 39 and has provided a UHF service to the Rockford area since April 29, 1953 (Station WTVO). Respondent Greater Rockford Television, Inc. obtained a grant on VHF Channel 13 on which it has provided a VHF service to the Rockford area since September 18, 1953 (Station WREX-TV). Early grants were similarly made on each of the three UHF channels allocated to Madison (Station WHA-TV on UHF Channel 21*, Station WKOW-TV on UHF Channel 27, and Station WMTV on UHF Channel 33).[3] Fortunately for the growth of UHF in this area, a grant of VHF Channel 3 in Madison to respondent Radio Wisconsin, Inc. was delayed until December 1955 by reason of the need for a comparative hearing on the two competing applications for that facility.

Long prior to the resolution of the Madison hearing for Channel 3 (10 RR 1224), it was becoming apparent to large segments of the television industry (with many

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[1] See Sixth Report of April 14, 1952, 1 RR Pt. III, pp. 661-665 (paras. 189, 197, 200).

[2] In its Sixth Report the Commission also allocated UHF Channel 45* to Rockford and UHF Channel 21* to Madison for noncommercial educational use.

[3] Station WKOW-TV began operation June 30, 1953; Station WMTV on July 8, 1953; and Station WHA-TV on March 26, 1954.

markets still being flooded with VHF-only receivers) that the Commission's 1952 policy of intermixing UHF and VHF in the same area was a mistake—that UHF stations in the larger markets were folding upon the advent of a *second* VHF service and in the smaller markets on the advent of a *first* VHF service (R. 434-447).[1] It seemed apparent that if the United States was not to be limited to television on 12 rather than the 82 channels envisaged by the Sixth Report, a change in allocation concepts was necessary. It was urged that the removal of VHF channels from markets where UHF stations were providing competitive service and the utilization of the deleted VHF channels in other areas already so predominantly VHF that UHF stations could not obtain a foothold (i.e., a policy of "deintermixture") would result in substantially more competitive service throughout the United States and a more effective utilization of valuable spectrum space, in line with the mandatory requirements of Sections 303(g) and 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)).[2]

After considerable prodding by Congress, and a number of "false starts",[3] the Commission finally concluded,

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[1] See the so-called Potter Hearings of May-June 1954 (Hearings on S. 3095, 83d Cong. 2d sess.), *passim*.

[2] See the so-called Plotkin and Jones Reports of February 1 and 12, 1955 (excerpted at R. 472-475).

[3] See Report and Order of November 10, 1955, 13 RR 1511; Memorandum Opinion and Order of November 10, 1955, 13 RR 1522, 1525; Notice of Proposed Rule Making, November 10, 1955 in Docket No. 11532, 20 Fed. Reg. 8501 (1955). It was the refusal of the Commission to hold VHF comparative grants in abeyance, while it was restudying its Sixth Report in the proceeding leading up to its *Second Report on Deintermixture*, which gave rise to the so-called "first round" of deintermixture appeals in the court below: See *Coastal Bend Television Co.* v. *FCC*, 97 U.S. App. D.C. 339, 231 F.2d 498 (1956), *ibid*, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); *Greylock Broadcasting Co.* v. *United States*, 97 U.S.

in its *Second Report on Deintermixture* of June 26, 1956 (13 RR 1571), that intermixture was not producing an integrated television system, that VHF in some instances was thwarting opportunities for effective competition among a greater number of stations, and, in the words of the court below, "that the intermixture of UHF and VHF channels was, on a nationwide basis, a failure." *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957).

Pending a further study of the feasibility of ultimately moving all television into the UHF band (thus eliminating the intermixture problem), the Commission concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, *on a case-to-case basis*, whether the deletion of VHF channels in predominantly UHF areas (and the substitution of UHF channels therefor) would improve "the opportunities for effective competition among a greater number of stations" (13 RR 1571, 1582).[1]

App. D.C. 414, 231 F.2d 748 (1956); *Van Curler Broadcasting Co.* v. *United States*, 98 U.S. App. D.C. 432, 236 F.2d 727 (1956); *Gerico Investment Co.* v. *United States*, 99 U.S. App. D.C. 379, 240 F.2d 410 (1957). Following the release of its *Second Report on Deintermixture* (June 26, 1956), the Commission *did* refuse to finalize VHF grants in the 13 areas where deintermixture proceedings were instituted (see Nos. 235 and 242, Oct. Term, 1958). During this interval (from November 10, 1955 to June 26, 1956) Channel 3 in Madison was granted to respondent Radio Wisconsin, Inc. (10 RR 1224).

[1] Commissioner Doerfer dissented from the interim deintermixture conclusions thus reached by the Commission in its *Second Report on Deintermixture* (13 RR 1571, 1594-1595), on the premise that the "equitable" distribution provisions of the Communications Act (47 U.S.C. Sec. 307(b)) required the Commission to allocate VHF as well as UHF channels to major markets, and thus foreclosed the Commission from making certain markets all-UHF and others all-VHF. Commissioner Mack likewise disagreed with the "interim" portion of the *Second Report on Deintermixture* (13 RR 1571, 1593).

To that end, on June 26, 1956 (concurrently with the release of its *Second Report on Deintermixture*), the Commission instituted some 13 proceedings to deintermix particular markets, including a proposal to deintermix Madison by reserving VHF Channel 3 for educational use and substituting a UHF channel therefor (R. 1-2).[1] Commissioners McConnaughey, Doerfer, and Mack dissented therefrom (R. 2). At petitioner's request the proceeding was broadened to include the deintermixture of both Madison and Rockford—by making Madison all-UHF and Rockford all-VHF, or alternatively by making both markets all-UHF (R. 69-77, 106-107, 388).[2]

Petitioner submitted voluminous data on December 3, 1956, showing that such shifts would not result in any substantial "white area" (R. 405-406, 415-416). It was further shown that this so-called "white area" (some 50 miles to the north and west of Madison) does in fact receive acceptable television service, as disclosed by the large number of sets in use in the area prior to the time WISC-TV (licensed to respondent Radio Wisconsin, Inc.) commenced operating on Channel 3 in June of 1956 (R. 394, 420-429).

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[1] In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's *Second Report on Deintermixture* and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted with a view to deintermixing particular markets. Senate Rep't No. 2769, 84th Cong., 3d sess. (excerpted at R. 520-526).

[2] More specifically, petitioner supported (1) the Commission's proposal to preclude the use of Channel 3 "for commercial purposes" in Madison, (2) its own counterproposal to assign Channel 3 to Rockford and substitute Channel 39 therefor in Madison, and (3) an alternative proposal that Rockford be deintermixed by deleting Channel 13 and substituting a UHF channel therefor (R. 388).

Petitioner likewise showed that, except for the city of Rockford itself, substantial portions of the area served by Winnebago (UHF Station WTVO) are predominantly VHF in character—to the northeast by reason of three VHF stations in Milwaukee, to the southeast by reason of three VHF stations in Chicago, to the southwest by reason of two VHF stations in *Rock Island-Davenport-Moline*,[1] and to the northwest by WISC-TV in Madison, which (if the channel remained there) would blanket all of Winnebago's service area to the northwest including the city of Rockford (R. 395-414). It was further pointed out that by reason of these multiple VHF signals, and the shortage of all-channel receivers in outlying areas, that Winnebago's continued operation on UHF (with WISC-TV placing a Grade B signal over Rockford) was highly problematical (R. 397, 430-433, 639-649). It was accordingly urged, in order to assure Rockford of a second competitive service and Madison of at least three competitive services, that VHF Channel 3 should be allocated to the Rockford area.

In its answering comments of December 28, 1956, Radio Wisconsin, Inc. made much of the fact that if Channel 3 were shifted to the Rockford area (Orangeville)[2] it would still provide a strong Grade B (and might even be so located as to provide a Grade A) signal into Madison—thereby arguing that Madison would not be "deintermixed" (R. 567-568).

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[1] In the proceeding to deintermix *Peoria*, progressing concurrently with that in Madison-Rockford, it was proposed to shift Channel 8 from Peoria to Rock Island-Davenport-Moline, thus making three VHF channels in that market (see No. 242, Oct. Term, 1958).

[2] In order to meet mileage separation requirements (transmitter to transmitter) it was necessary, in the event Channel 3 was shifted from Madison to Rockford, to place the transmitter in the vicinity of Orangeville, Wisconsin—from which location the requisite city-grade signal could be placed over Rockford (R. 413).

Winnebago tendered supplemental data (R. 769-791) showing that if Station WCIA on Channel 3 in Champaign, Illinois shifted its transmitter site to the south, Channel 3 could be utilized south and west of Rockford (at a distance of 60-70 miles from Madison), from whence it would place little or no signal in Madison but nevertheless provide a city-grade service to Rockford. Winnebago offered to pay the expenses of such a move by Station WCIA. It was further pointed out that such a shift in WCIA's transmitter location would improve the UHF picture in Peoria and Bloomington, Illinois (R. 776) and that a shift of Channel 3 from Madison to Rockford *would compensate the state of Illinois for the loss of a VHF channel it would suffer in the contemplated move of Channel 2 from Springfield, Ill. to St. Louis, Mo.* (R. 777-778).[1] It was further urged that if Channel 3 were used in the Orangeville area its signal could be suppressed in the direction toward Madison by directional means and concentrated toward Rockford, thereby obviating any intermixture problems in Madison (R. 776, 787-790).

By Report and Order adopted February 26 and released March 1, 1957, the Commission (by a 4-3 vote) refused to modify its 1952 allocations in the Rockford-Madison area (R. 792-802). Although rejecting Winnebago's supplemental pleadings as untimely (R. 798, para. 16), it nevertheless placed much stress on the fact that if Channel 3 were shifted to Rockford it would continue to infiltrate the Madison area from Orangeville (R. 797, para. 13).

In a Petition for Reconsideration filed April 1, 1957 Winnebago highlighted the inconsistencies, referred to by

[1] These proceedings pertaining to Springfield and Peoria, like the instant proceeding for Madison-Rockford, were among the 13 which the Commission instituted on June 26, 1956, concurrently with its *Second Report on Deintermixture* (see Nos. 235 and 242, Oct. Term 1958).

the dissenting Commissioners (R. 799-802), between the Commission's action in Madison and its actions *of the same day* deintermixing Peoria, Springfield, Evansville, Fresno, Elmira, and Schenectady (R. 816-830). If re-emphasized the "public interest" aspects of its supplemental pleadings which the Commission had rejected as untimely (R. 816-830). By Memorandum Opinion and Order released June 24 the Commission by the same 4-3 vote denied the aforesaid Petition (R. 864-873). These actions of the Commission were the subject matter of an Appeal and Petition for Review duly filed in the court below (under 47 U.S.C. Secs. 402(a) and (b)). That court affirmed *per curiam*, relying primarily on its decisions a few weeks earlier in two deintermixture appeals from other March 1, 1957 actions of the Commission (Peoria and Hartford).

REASONS FOR ALLOWANCE OF THE WRIT

1. *The Decision Below Is in Conflict with this Court's Decision in the Chenery Case.*—In each of the eight deintermixture proceedings decided March 1, 1958 (Peoria, Springfield, Evansville, Fresno, Elmira, Schenectady, Hartford and Madison),[1] Commissioners Hyde, Lee and Bartley voted to deintermix, by removing a VHF allocation from an area which was otherwise predominantly UHF, in line with the *Second Report on Deintermixture* and the Senate Committee's endorsement thereof. In each instance, Commissioners Doerfer and Mack voted not to deintermix. Commissioner Doerfer on the ground (contrary to subsequent decisions of the court below)[2] that Section 307(b) foreclosed the Commission from de-

[1] See 22 FCC 293-395 (1957).

[2] *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 235); *WIRL Television Co.* v. *United States*, 253 F.2d 863 (U.S. App. D.C., 1958), vacated by this Court on other grounds October 20, 1958 (No. 242).

leting wide-coverage VHF channels from major markets to which they were allocated in 1952 (13 RR 1571, 1594; 22 FCC 376, 378-379 and fn. 15), and Commissioner Mack apparently because of his opposition to "piecemeal" deintermixture (13 RR 1571, 1593).

Although the 13 proceedings instituted June 26, 1957, as a result of the Second Report on Deintermixture, were designed to determine on a case-to-case basis whether deintermixture would or would not improve the opportunities for more effective competition among a greater number of stations (in line with 47 U.S.C. Sec. 303(g)), it is apparent from Commissioner Doerfer's dissent in Fresno (22 FCC 376, 378-379), which he made applicable to each of the other cases were deintermixture was ordered (22 FCC 376, fn. 15), that he cast his vote in each of these deintermixture cases on the erroneous *legal* premise (regardless of the particular facts of record in a given proceeding) that the Commission lacked authority (by reason of 47 U.S.C. Sec. 307(b)) to delete the one and only VHF channel allocated to that market and to substitute UHF channels therefor.

Since a key vote (Commissioner Doerfer) against deintermixing Madison and Rockford was predicated on an erroneous legal premise,[1] the decision below affirming the Commission's 4-3 action refusing to deintermix Madison-Rockford ignored the salutary doctrine, frequently enunciated by this Court, that the validity of agency action must be determined on the grounds on which the agency itself places its decision and not on some different ground, however cogent. *Securities and Exchange Com.*

[1] The petitioner in *Sangamon Valley Television Corp.* v. *United States* re-echoed Commissioner Doerfer's views regarding 47 U.S.C. Sec. 307(b), which the court below expressly rejected (255 F.2d 191). Although this Court has since vacated that judgment on other grounds (No. 235, Oct. Term, 1958), we do not construe that action as casting doubt on that phase of the lower court's decision.

v. *Chenery Corp.*, 318 U.S. 80, 87-88. How Commissioner Doerfer, and perhaps Commissioner Mack, would have voted had they decided the Madison-Rockford case on the *facts of record*, uninfluenced by the *erroneous* belief that they were precluded as a matter of law (by reason of 47 U.S.C. Sec. 307(b)) from removing Channel 3 from Madison, a court can only speculate. In such situations, under the *Chenery* doctrine, the case should be remanded to the administrative agency. Because of the impact on petitioner, of retaining Channel 3 in Madison, petitioner was entitled to a decision predicated *on the facts developed* on the record, and not one resulting from a mistaken interpretation of the requirements laid down by Congress in 47 U.S.C. Sec. 307(b).

2. *The Decision Below Contravenes Congressional Policies Embodied in the Communications Act.*—The Commission is under a mandate to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)) and "to provide a fair, efficient, and equitable distribution of radio service" among the several states and communities. Whether the basic policies thus set forth in these key provisions of the governing statute are or are not being effectuated by an administrative agency is a proper matter for judicial scrutiny. Unless the agency states the reasons for its actions with sufficient precision and logic to enable the courts to determine whether the challenged action is or is not in furtherance of expressed Congressional policy, the matter should be remanded to the agency for further proceedings. *Schaffer Transportation Co. v. United States*, 355 U.S. ——.

Here, the Commission did not consider (R. 792-802) what the impact of the Channel 3 operation in Madison would be on petitioner's UHF operation in Rockford, Ill. It failed to explain why the retention of Channel 3 in Madison would not adversely affect the number of com-

petitive services which Madison and Rockford would otherwise have. It gave no consideration, as a *different* majority did in Elmira and Vail Mills, to the advisability of not utilizing Channel 3 in either Madison or Rockford. It gave no consideration to petitioner's proposal that even if Channel 3 were kept in Madison, Rockford should be made all-UHF. The majority's "reasoning" (as evidenced by the dissents of Commissioners Hyde, Lee, and Bartley) is completely at loggerheads with the *Peoria* and *Springfield* decisions released the same day (in which Hyde, Lee and Bartley helped constitute the majority, and in which deintermixture was ordered).[1]

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[1] The action in Madison (where four Commissioners refused to deintermix that market) cannot be harmonized with the action in six other cases decided the same day (where different majorities reached diametrically opposite conclusions):

(a) It cannot be explained by a desire on the part of the majority of the Commission to retain the VHF channels in the states to which they were originally assigned by the Sixth Report, because in three cases—Springfield, Peoria, and Evansville—VHF channels allocated to one state by the Sixth Report were shifted to another state or states by the actions of March 1, 1957. 22 FCC 318; 22 FCC 342; 22 FCC 382. In fact, in the Sixth Report the Commission had allocated to Illinois, with a substantially larger population than either Missouri or Wisconsin, fewer VHF channels than to either of those states (approximately at the ratio of 1:4). Having shifted on March 1, 1957 Channel 8 from Peoria to Rock Island-Moline (Ill.)-Davenport (Ia.), and Channel 2 from *Springfield* to St. Louis, Mo., the Madison-Rockford proceeding afforded the Commission an excellent opportunity to rectify in some degree the deficiency in VHF allocations thus suffered by Illinois.

(b) It cannot be harmonized on any theory of not permitting scarce VHF channels to go unused, because in two instances, Channel 10 in Vail Mills and Channel 9 in Elmira, the VHF channel was placed "on ice" and not allocated elsewhere in order to foster the development of UHF facilities. 22 FCC 293; 22 FCC 307; cf. 15 RR 1682 (1957).

(c) It cannot be justified on any "white area" concept because Radio Wisconsin's evidence on this score was no more persuasive than comparable evidence adduced in the six proceedings where deintermixture was ordered. The fact that the UHF stations in Madison, with the elimination of the lethal threat of competition

Petitioner is a licensee of the Commission, with limited property rights in the facilities by which it is providing a UHF service to Rockford. *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948). In its *Second Report on Deintermixture* the Commission recognized that the intermixture of VHF and UHF stations in the same markets

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from Channel 3, would augment their power and provide satellite service (a factor considered in Peoria and Springfield) (Nos. 235 and 242, Oct. Term 1958), was ignored by the Commission in paragraph 14 of its conclusions in Madison (R. 797), as was the showing made by petitioner that so-called "white area" was in fact receiving service from other stations in Wisconsin even before Channel 3 got on the air (R. 420-429).

(d) It cannot be explained on terrain factors because in Elmira, Vail Mills, and the Berkshire Mountains of western Massachusetts, the terrain is recognizedly less favorable to UHF propogation than in the Madison area (22 FCC 293; 22 FCC 307).

(e) It cannot be rationalized on any theory that the area in question will not support an adequate number of UHF operations to provide competitive service, because (except for the Connecticut Valley) the Madison-Rockford area has more existing UHF operations than any other area involved in the various deintermixture proceedings decided March 1, 1957 (see R. 434-447).

(f) It cannot be explained on any dislocation concept because in Evansville, Fresno, and Schenectady the Commission proposed to shift *existing* VHF operations. 22 FCC 382; 22 FCC 365; 22 FCC 293. In according WISC-TV "credit" for existing coverage, the Commission conveniently overlooked assurances given UHF operators in its November 10, 1955 Reports and Orders and subsequent assurances given the court below (in defending such actions) that VHF grants made while Docket No. 11532 was being resolved would not subsequently be used as an "excuse" for not deintermixing areas which were then exclusively UHF.

(g) It cannot be justified on the ground of penetration into the Madison area of VHF signals from outside stations, because in each of the markets which the Commission did deintermix a not dissimilar situation existed (for example, Champaign's penetration of Springfield, Davenport-Rock Island-Moline's penetration of *Peoria*, etc.). Furthermore, such an "excuse" ignored the Commission's authority to minimize such penetration by the Rockford stations (if that market was made all-VHF) by requiring them to directionalize or to deny transmitter locations "unnecessarily close" to Madison (in line with action promised in Peoria), and took no account of petitioner's alternative proposal that Rockford

was a mistake, and that UHF stations could not compete in areas served by two VHF stations (Channel 13 in Rockford and Channel 3 in Madison).[1] The Commission instituted proceedings to rectify that mistake in the Madison area (Docket No. 11754). The utilization of Channel 3 in Madison, since it will mean fewer UHF receivers in that area, will reduce petitioner's coverage in and around Rockford just as detrimentally as would a grant which creates electronic interference. *Federal Communications Commission* v. *National Broadcasting Company*, 319 U.S. 239.

Because of the direct impact which the retention of Channel 3 in Madison will have on existing UHF service in the Madison-Rockford area, petitioner was entitled to

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be made all-UHF, by deleting Channel 13 and substituting a UHF channel therefor.

(h) It cannot be explained on the premise that the educational station in Madison was already operating on UHF and that the Wisconsin legislature had not appropriated funds to shift the operation to VHF. WHA-TV still preferred the VHF assignment (see R. 793) and did not object to shifting to Channel 3 if funds could be procured to cover the expense involved. In scores of cases the Commission has continued educational reservations where the legislatures have not yet appropriated the necessary funds. In any event, such reasoning does not dispose of another alternative before the Commission of allowing WHA-TV to remain on Channel 21, of placing Channel 3 "on ice", and of shifting Channel 39 from Rockford to Madison for WISC-TV.

[1] "Our experience in other markets convinces us that the advent of a second VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of existing UHF stations to continue to provide service in the area." 22 FCC 293, 302 (para. 19): Cf. Commission's brief in the court below in *WIRL Television Company* v. *United States* (Br. p. 3): "It seems clear that despite the head start of the [two] UHF stations in Peoria operation there by *one* VHF VHF station proposed in 1952 is likely *to seriously jeopardize* the continued successful operations of one or both of the existing UHF stations as well as any real possibility of the successful development of a fourth station." See also *Channel Assignment to Columbia, S. C.*, 15 RR 1682, 1688 (1957).

a due process determination whether the use of Channel 3 in Madison would serve the public interest, i.e., a decision correctly setting forth the basic facts, with rational and logical conclusions drawn therefrom. That right cannot be destroyed by labeling the proceeding as "rule-making" rather than "adjudicatory," where the impact of the proposed "rule" is "particular and immediate" rather than "general and future." *Philadelphia Co.* v. *Securities and Exchange Com'n*, 84 U.S. App. D.C. 73, 81, 175 F. 2d 808 (1948), dismissed as moot 337 U.S. 901. Where agency action "necessarily affects existing rights, . . . whether by the one form of action or the other, the ordinary distinction between 'quasi-legislative' and 'quasi-judicial' action gives way before the elementary requirement that right be not destroyed or impaired without hearing." *National Broadcasting Co.* v. *Federal Communications Commission*, 76 U.S. App. 238, 248, 132 F.2d 545 (per Rutledge, J.), aff'd on other grounds 319 U.S. 239; *Philadelphia Co.* v. *Securities & Exchange Com'n*, 84 U.S. App. D.C. 73, 175 F.2d 808, dismissed as moot, 337 U.S. 901; *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 46, 175 F.2d 351; see Davis, "Requirement of a Trial-Type Hearing," 70 *Harvard Law Review* 193-280 (1956).

Absent a decision which contains basic findings with rational conclusions drawn therefrom, it is not possible for a reviewing court to determine whether the agency has or has not given effect to congressional policies embodied in the governing statute, and whether the agency has or has not impaired petitioner's rights in an arbitrary and capricious fashion. In such situations the matter should be remanded to the agency so that it may at least set forth with more precision the basis of its decision. *Schaffer Transportation Co.* v. *United States*, 355 U.S.

3. The Decision Below Raises Important Questions Which Have Not Been but Which Should be Resolved by this Court.—On its own motion, concurrently with the release on June 26, 1956, of its *Second Report on Deintermixture,* the Commission instituted proceedings with a view to deintermixing 13 markets, and in that way rectifying to the degree possible the mistaken "intermixture" principle embodied in its 1952 allocation table. The Commission made it clear that requests to deintermix other markets would be considered in due course (13 RR 1571, 1584, para. 37).

On March 1, 1957, as a result of these "pilot" proceedings, the Commission simultaneously issued Reports and Orders (final or tentative) in the following eight general areas—Albany-Schenectady-Troy-Vail Mills, N. Y. (22 FCC 293); Elmira, N. Y. (22 FCC 307); Springfield, Ill.-St. Louis, Mo.-Terre Haute, Ind. (22 FCC 318); Hartford, Conn.-Providence, R. I. (22 FCC 332); Peoria, Ill.-Rock Island-Davenport-Moline, Ill.-Iowa (22 FCC 342); Madison, Wisc.-Rockford, Ill. (22 FCC 356); Fresno-Bakersfield-Santa Barbara, Cal. (22 FCC 365); and Evansville-Hatfield, Ind.-Owensboro, Louisville, Ky. (22 FCC 382).

Five of these cases have since been separately appealed to the court below, with the Commission's actions deintermixing or refusing to deintermix affirmed in each of the four cases thus far decided (Peoria, Springfield, Hartford and Madison).[1] The fifth is awaiting decision. Other deintermixture proceedings decided March 1, 1957

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[1] *WIBL Television Co.* v. *United States,* 253 F. 2d 863 (U. S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 242, Oct. Term 1958); *Sangamon Valley Television Corp.* v. *United States,* 255 F. 2d 191 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 235, Oct. Term, 1958); *Springfield Television Broadcasting Corp.* v. *United States,* —— F. 2d —— (U. S. App. D.C. 1958); and *Winnebago Television Corp.* v. *United States,* 258 F. 2d 163 (U. S. App. D.C. 1958).

by the Commission (e.g., Fresno and Evansville) are awaiting "show cause" hearings under 47 U.S.C. Sec. 316 before they can be finalized by the Commission and reviewed by the courts. Requests to deintermix other areas have since been decided and numerous petitions to deintermix still other markets are awaiting action by the Commission.[1]

In short, a substantial volume of the Commission's current workload relates to proposals to improve the 1952 television allocation table by making some markets all-UHF and others all-VHF—in an effort to provide more effective competition among a greater number of stations, thereby preserving for future use the 70 UHF channels essential to a truly nationwide competitive television system.[2]

In each of these deintermixture proceedings, because this Court has not yet spoken on these matters, substantial portions of the comments filed by interested parties deal with the question of the Commission's authority to take the action it proposes (cf. R. 3-68, 152-200, 528-535) with diametrically opposite views expressed on the scope and limitations of Sections 303(g) and 307(b) of the Communications Act (47 U.S.C. Secs. 303(g) and 307(b)), and on the need for adjudicatory hearings under Sections 303(f) and 316 of the Communications Act (47 U.S.C. Secs. 303(f) and 316), especially where the impact of a so-called "rule-making" proceeding is "particular and immediate" rather than "general and future." See *Phila-*

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[1] E.g., *Channel Assignment to Columbia, S. C.*, 15 RR 1682 (1957); *Walla Walla Deintermixture Case*, 16 RR 1636 (1958); *Channel Assignments in Pittsburgh, Pa.*, 16 RR 1558 (1957); see 22 Fed. Reg. 2050, 3127, 3185, 4365, 5613.

[2] "As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels are not adequate to make possible sufficient outlets for a fully competitive television system." *Second Report on Deintermixture*, 13 RR 1571, para. 12 (1956).

delphia Co. v. Securities and Exchange Com'n, 84 U.S. App. D.C. 73, 175 F.2d 808 (1948), dismissed as moot, 337 U.S. 901 (1949).

With individual members of the Commission themselves in disagreement over the scope and limitations of 303(g) and 307(b), as evidenced by Commissioners Hyde, Lee and Bartley voting to deintermix and with Commissioner (now Chairman) Doerfer taking the position that he is precluded, as a matter of law (by reason of 47 U.S.C. Sec. 307(b)) from deleting a VHF channel in a major market (13 RR 1571, 1954; 22 FCC 378-379), the matter of the Commission's legal authority in this field is one of general importance to the broadcast industry. The Commission's precise authority on this score thus presents important and recurring questions which have not yet been but which should be decided by this Court.

Since all appeals from Commission action under Section 402(b) of the Communications Act (47 U.S.C. Sec. 402(b)) must be brought, and since most appeals under Section 402(a) of that Act (47 U.S.C. Sec. 402(a)) are brought, in the court below, the occasion for a conflict of circuits will be rare.[1] With the future course of television broadcasting (whether on VHF alone, on UHF alone, or on an intermixed or a deintermixed basis) at issue, the question of the Commission's authority to deintermix or not to deintermix given markets, and the extent to which its actions in this field are limited by Sections 303(f), 307(b) and 316 of the Communications Act (47 U.S.C. Secs. 303(f), 307(b) and 316) is a matter of sufficient and recurring public importance to merit consideration by this Court.

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[1] Since 1956 the court below has decided on the merits no fewer than nine deintermixture appeals (see cases cited in fn. 3 p. 5 and fn. 2 p. 10), in each instance affirming vacillating results reached by the Commission. No such cases have been decided on the merits in any of the other circuits.

4. *The Decision Below Should in any Event Be Vacated.*—As heretofore noted, the Commission on June 26, 1956, pursuant to its Second Deintermixture Report, instituted deintermixture proceedings in 13 critical television areas. On March 1, 1957, decisions were reached in eight of those proceedings (including Peoria, Springfield, and Madison). Four have been heard and affirmed by the court below. However, two decisions of the court below were vacated by this Court on October 20, 1958 because of alleged *ex parte* presentations to individual Commissioners in the Springfield proceeding and the interrelationship between the proceedings in Peoria and Springfield (Nos. 235 and 242, Oct. Term 1958). In the instant appeal, the court below relied on its decision in *Peoria* which this Court has since vacated.

The above-mentioned deintermixture decisions all stem from the Commission's *Second Report on Deintermixture*; they were considered by the Commission together, with each of these decisions announced the same day (March 1, 1957). Whether Channel 3 should be shifted from Wisconsin to Illinois should turn in part on whether Channels 2 and 8 (heretofore allocated to Springfield and Peoria) are or are not shifted to other states. The cases are thus closely interrelated factually, geographically and legally.

With charges of *ex parte* presentations pending in at least one of the proceedings, on which the court below relied for affirmance of the Commission's action in Madison,[1] and with the vote of resigned member Commissioner

[1] It is the Commission's position that it is not limited in the discharge of its quasi-legislative responsibilities, as in cases of adjudication, to "matters presented on the record." See Commission response of October 30, 1958, in *Owensboro on the Air* v. *Federal Communications Commission*, Case No. 13,776 et al (U.S. App. D.C.); see Brief in Opposition, *Van Curler Broadcasting Corp.* v. *United States* (No. 489, Oct. Term 1956). The record certified by the Commission to the court below in the instant proceeding is restricted to formal pleadings.

Mack necessary to the result reached by the majority in Madison-Rockford case, certiorari should be granted, the decision below should be vacated, and the case remanded for appropriate further proceedings (as in Nos. 235 and 242)—so that the various interrelated deintermixture cases heretofore decided by different majorities of the Commission can be resolved with some degree of logic and consistency.

WHEREFORE, it is respectfully prayed that the instant petition for writ of certiorari be granted.

Respectfully submitted,

By JAMES A. McKENNA, JR.
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November 14, 1958

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14086.

WINNEBAGO TELEVISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

RADIO WISCONSIN, INC., AND
GREATER ROCKFORD TELEVISION, INC., INTERVENORS.

On Petition for Review of Orders
of the Federal Communications Commission

Decided July 2, 1958

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, were on the brief, for petitioner.

Mr. Richard A. Solomon, Assistant General Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker*, General Counsel, Federal Communications Commission, *John J. O'Malley, Jr.*, Counsel, Federal Communications Commission, and *Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for respondents.

Mr. Arthur W. Scharfeld, with whom *Mr. Arthur Stambler* was on the brief, for intervenor Radio Wisconsin, Inc.

Mr. Stanley S. Neustadt for intervenor Greater Rockford Television, Inc. *Messrs. Marcus Cohn* and *Paul*

Dobin were on the brief for intervenor, Greater Rockford Television, Inc.

Before WILBUR K. MILLER, WASHINGTON and BURGER, *Circuit Judges.*

PER CURIAM: Petitioner Winnebago, operator of a UHF station at Rockford, Illinois, seeks review of an order of the Federal Communications Commission denying, after a rule-making proceeding, proposals to amend channel assignments in Madison, Wisconsin, and Rockford. After consideration of the record in light of petitioner's contentions, we find no basis for disturbing the Commission's action. *Cf. Coastal Bend Telev. Co.* v. *F.C.C.*, 98 U.S.App.D.C. 251, 234 F.2d 686 (1956); *WIRL Telev. Co.* v. *F.C.C.*, — U.S.App.D.C. —, 253 F.2d 863 (1958); *Springfield Telev. Broadcasting Corp.* v. *F.C.C.*, — U.S.App.D.C. —, — F.2d — (June 19, 1958).

Affirmed.

FILE COPY

Office Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 517

In the Supreme Court of the United States

OCTOBER TERM, 1958

WINNEBAGO TELIVISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 517

WINNEBAGO TELEVISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22–23) is reported at 258 F. 2d 163. The decision of the Federal Communications Commission (R. 792–802) is reported at 22 F. C. C. 356, and its order denying rehearing (R. 869–873) at 23 F. C. C. 53.

JURISDICTION

The judgment of the court of appeals affirming the orders of the Commission was entered on July 2, 1958. By order of the Chief Justice dated September 19, 1958, the time for filing a petition for certiorari was extended to November 14, 1958. The petition for

a writ of certiorari was filed on November 14, 1958. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and 47 U. S. C. 402 (j).

QUESTIONS PRESENTED

1. Whether the Commission's decision not to change its 1952 television channel assignments in Madison, Wisconsin, and Rockford, Illinois, is based on adequate findings and conclusions.

2. Whether the validity of the Commission's orders is affected by its rulings in other channel reallocation proceedings or by the action of this Court in *Sangamon Valley Television Corporation* v. *United States*, and *WIRL Television Company* v. *United States*, Nos. 235 and 242, this Term.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U. S. C. 151, *et seq.*, are set forth in the petition (p. 3).

STATEMENT

The Federal Communications Commission on March 1, 1957, after full rule-making proceedings initiated on its own motion,[1] declined to amend Section 3.606 of its Rules (47 C. F. R. 3.606), comprising a nationwide allocation of television channels, by reassigning the only VHF channel (Channel 3) in Madison, Wisconsin, from commercial to educational use or, alternatively, transferring the channel to Rockford, Illi-

[1] The background which led the Commission to institute the proceeding is set forth in the Government's brief in opposition in *Springfield Television Broadcasting Corporation* v. *United States*, No. 516, this Term, pending on petition for a writ of certiorari.

nois, 55 miles south of Madison, as a second VHF commercial channel (R. 792–802). The Commission found that large numbers of persons in rough terrain areas to the north and west of Madison would lack any commercial television service if either proposal was adopted (R. 793, 795–797, 872). In addition, the Commission found that reserving Channel 3 for educational use in Madison would entail a grave risk of terminating all educational television there, since educational groups—presently operating inexpensively on a UHF channel—lacked and were unlikely to obtain the public funds necessary to convert to VHF transmitting equipment (R. 793, 798). The Commission further found that the alternative of transferring the channel to nearby Rockford would not free the Madison area from VHF competition, and might cause the situation to worsen since a new station on Channel 3 at Rockford would still provide a strong signal over Madison and might stimulate the existing low power Rockford VHF station to increase its service area, thus providing a second strong VHF signal over Madison (R. 796–797, 798).[2] The Commission accordingly concluded that both proposals for the reassignment of Channel 3 were contrary to the public interest (R. 793, 798) and reaffirmed its decision on reconsideration on June 26, 1957 (R. 869–873).

[2] The Commission also considered a proposal by petitioner that the transmitter of a station operating on Channel 3 in Champaign, Illinois, be relocated to permit a Rockford Channel 3 assignment which would not cover Madison, but rejected the proposal upon the ground that it would increase the area southwest of Madison which would lack any service (R. 798, 872, n. 1).

Petitioner, the licensee of a UHF channel serving the Rockford area, participated in the rule making proceeding and sought judicial review of the Commission's decisions, from which the Madison UHF stations did not appeal.

On appeal, the court below affirmed the Commission's orders in a *per curiam* opinion. The court, citing *Coastal Bend Television Co.* v. *F. C. C.*, 234 F. 2d 686 (C. A. D. C.); *WIRL Television Co.* v. *F. C. C.*, 253 F. 2d 863 (C. A. D. C.); and *Springfield Television Broadcasting Corp.* v. *F. C. C.*, 259 F. 2d 170 (C. A. D. C.), petition for writ of certiorari pending, No. 516, this Term (*supra*, p. 2), said (Pet. App. 23):

> After consideration of the record in light of petitioner's contentions, we find no basis for disturbing the Commission's action.

ARGUMENT

1. The basis of petitioners' contention that the decision below contravenes Congressional policy embodied in the Communications Act (Pet. 12–16) is that the Commission did not adequately set forth the grounds for its decision. But we submit that these grounds, which we have previously summarized (*supra*, p. 3), are not only clearly set forth but also fully support the conclusion that a change in the existing assignment of Channel 3 to Madison would not serve the best interests of the listening and viewing public. Petitioners show at most that a court, if empowered to determine this issue initially or to make a *de novo* determination, might conceivably reach a conclusion different from that of the Commission. But a court reviewing an

order of the Commission has a much more limited function and power. See Government's brief in opposition in No. 516, at page 9. We submit, therefore, that petitioners' contention raises no question of substance.

2. Petitioners' contention that the Commission's decision is invalidated by reason of its rulings against deintermixture in certain other proceedings, or by reason of the fact that one of the majority Commissioners in the present case had dissented from the foregoing rulings (Pet. 10–12, 17–19), renew the same contentions made in No. 516. We therefore refer to the Government's answer to these contentions in its brief in opposition in that case (pp. 9–10). In connection with the latter contention, we point out that here, as in No. 516, the Commission's comprehensive reports (R. 792–800, 869–872) dealt solely with the question of whether a change in the Channel 3 assignment to Madison would or would not be in the public interest, and nowhere even remotely suggested that lack of statutory authority was a factor in the decision not to deintermix.

3. Petitioners' final contention (Pet. 20–21) is that the decision below should be vacated and the case remanded to the court of appeals because of the action of this Court in *Sangamon Valley Television Corp.* v. *United States* and *WIRL Television Co.* v. *United States*, Nos. 235 and 242, this Term. But the Commission's decision here to adhere to the *status quo* in Madison does not rest in any respect upon the decisions in favor of deintermixture rendered in those cases. In addition, we are aware of no subsequent

testimony before a Congressional Committee or other development to indicate that any *ex parte* representation was made to any Commissioner on the merits of the instant rule-making proceeding—the basis for the orders entered by this Court in *Sangamon* and *WIRL*. We submit that, in these circumstances, petitioners show no basis for vacating the judgment of the court below.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1958

U. S. GOVERNMENT PRINTING OFFICE: 1958

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No. 517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

WINNEBAGO TELEVISION CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, RADIO WISCONSIN, INC., and GREATER ROCKFORD TELEVISION, INC., *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT, RADIO WISCONSIN, INC., IN OPPOSITION TO THE PETITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 517

WINNEBAGO TELEVISION CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, RADIO WISCONSIN, INC., and GREATER ROCKFORD TELEVISION, INC., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT, RADIO WISCONSIN, INC. IN OPPOSITION TO THE PETITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (petitioner's Appendix) is reported at 258 F. 2d 163. The basic decision of the Federal Communications Commission (R. 792-802) is reported at 22 FCC 356, and its decision denying reconsideration (R. 869-873) at 23 FCC 53.

JURISDICTION

The judgment of the court below, affirming the Commission, was entered on July 2, 1958. The petition was filed on November 14, 1958, pursuant to an extension of time therefor. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1) and 47 U.S.C. Sec. 402(j). The time for the filing of instant respondent's opposition has been extended to and including December 29, 1958.

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

In the view of respondent Radio Wisconsin, Inc., the questions presented for review are:

1. Whether the court below properly sustained the Commission's decision on the basis of the FCC Docket 11754 record before it which had reaffirmed the allocation of VHF television Channel 3 at Madison, Wisconsin, and refused to reallocate that Channel as a non-commercial frequency in Madison or to shift it as a commercial frequency to the city of Rockford, Illinois.

2. Whether under the facts and circumstances here presented, this Court's action vacating the judgments of the court below in (Oct. Term, 1958) cases Nos. 235 and 242 requires similar disposition of this case.

SUPPLEMENTAL STATEMENT OF FACTS

The following facts, in respondent's view, should also be considered by the Court in evaluating the instant petition:

Respondent, Radio Wisconsin, Inc. (hereinafter Radio Wisconsin) is the licensee of commercial tele-

vision Station WISC-TV which operates on VHF television Channel 3 at Madison, Wisconsin. Station WISC-TV has been on the air since June 25, 1956, its original construction permit having been granted by the Commission on December 12, 1955, following and as the result of a protracted comparative proceeding between competing applicants.

The instant Petition for a Writ of Certiorari challenges the July 2, 1958 decision of the United States Court of Appeals for the District of Columbia Circuit which sustained Federal Communications Commission decisions of March 1, 1957 and June 24, 1957 reaffirming and retaining the allocation of television Channel 3 as a commercial frequency at Madison, Wisconsin as part of the Commission's nationwide Table of Television Assignments and rejecting, after hearing, proposals to delete that Channel for reallocation, either as an educational noncommercial facility in Madison or shifted as a commercial facility to Rockford, Illinois.

Petitioner Winnebago Television Corp. (hereinafter Winnebago) is the licensee of television Station WTVO operating on UHF Channel 39 at Rockford, Illinois. Its appeal was from that part of the Commission's decisions which denied Winnebago's counterproposal in Docket 11754 that Channel 3 be deleted entirely from Madison and be reallocated to Rockford to be used by its Station WTVO (with its transmitter at Orangeville, Illinois, some 30 miles from Rockford and 43 from Madison) in place of its present UHF frequency.

Television Channel 3 was originally allocated at Madison, Wisconsin, as part of the Commission's

April 14, 1952 Sixth Report and Order which finalized a four-year nationwide allocations proceeding involving all television channels by adopting a fixed Table of TV Assignments as Section 3.606 of its rules and regulations. (1 Pike & Fischer, RR Part 3, pp. 91:599 et seq.).[1] The Commission's decisions which are the subject of the instant petition represented the *sixth time over the past seven years* that the Commission has separately considered and rejected proposed reallocations of Madison Channel 3 and has determined and redetermined to retain that Channel as is as part of its nationwide allocations plan.

Generally dissatisfied with the recent failure of the television medium to develop on as extensive a nationwide basis as desired, the Commission on June 26, 1956 determined to consider a series of possible solutions to the problem. Firstly, by Report and Order of that date (in its Docket 11532), it undertook a long-range inquiry into the possibility of shifting all television into the newer UHF portion of the spectrum at some indefinite future time, which inquiry is ostensibly still underway with no fixed schedule for its resolution. At the same time the Commission (although rejecting proposals for an extensive, nationwide system of so-called "selective deintermixture" of individual channels as ineffective and impracticable),

[1] The allocation of a VHF Channel at Madison goes back in time even further to 1948, Radio Wisconsin having originally filed its application for a Madison VHF Station (then for Channel 9) in April of 1948. In its Sixth Report & Order, the Commission finalized its proposed allocation of a VHF Channel (#3) at Madison, expressly rejecting proposals for the prospective "deintermixture" of that city's commercial allocations by reserving Channel 3 for educational purposes. (Id., pp. 91:818.)

instituted on its own motion nine separate proceedings proposing to consider in the interim the possible reallocation of the VHF channels respectively allocated at nine separate communities. The stated purpose for the proposals was the possibility of increasing the opportunity for effective competition among a greater number of stations in each such city. Madison Channel 3 was the subject of one such proceeding (Docket 11754), pursuant to prescribed procedures calling for the Commission's separate case-by-case consideration of this proposed reallocation within the purview of certain suggested general criteria which had previously been enunciated in its aforesaid Report and Order in Docket 11532.

In the Commission's Madison-Channel 3 proceeding (Docket 11754) Radio Wisconsin, then operating WISC-TV on that frequency, extensively challenged the agency's lawful authority to consider or adopt such proposed reallocation and the procedures being utilized therewith, as well as opposing any reallocation as contrary to the public interest under the factual circumstances existing with respect to that particular frequency. Petitioner Winnebago, depending on the substantive and procedural legality of the proceeding for its counter-proposal, did not challenge them, but rather urged such reallocation to be in the public interest on factual and policy considerations.

After the separate rule making hearing on the proposed reallocation of Madison-Channel 3, the Commission (by 4-3 vote) reaffirmed that allocation and denied the reallocation proposals. Its decisions that the existing Madison Channel 3 allocation was in the public interest and reallocation contrary thereto, were

specifically grounded upon the indigenous facts and circumstances of the record in Docket 11754 relating to that particular frequency, within the purview of the enunciated general criteria. The Commission first denied the proposed reservation of Channel 3 for educational purposes (which would have looked toward shifting WISC-TV on Channel 3 into the UHF), on grounds that the record demonstration of educational inability to finance any forced conversion to Channel 3 "could well be the death knell of educational television in Madison." (22 FCC 356, 358.) The Commission then considered and denied the proposed reallocation of Madison Channel 3 to Rockford (which likewise would have forced WISC-TV off Channel 3 and into the UHF) as the necessary resultant of a number of compelling factors: Thus, it found and concluded that:

> (1) A close examination of all of the vast and disputed technical data of record in Docket 11754 established that an extensive loss of existing TV service would result from the proposed reallocation, (i.e., between 59,233 and 102,159 persons would thereby lose their only TV service, and an additional 51,000 to 62,000 persons would lose their second TV service). (Id., pars 9-10; 22 FCC 53, Par. 11, R. 157-161).[1]

[1] Petitioner's reference (p. 7) to its voluminous technical data significantly ignores the compelling fact that the Commission on the record of *all* such data concluded that that submitted by respondent Radio Wisconsin was generally accurate and reliable as well as conforming to the best data otherwise available to the agency, and that petitioner's data was unreliable and inaccurate, in part due to a faulty method of equipment calibration which involved "numerous opportunities for misleading results", and also as being out of line with the Commission's experience, with its estimated contours, and with other data before it relating to

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(2) The terrain to the north and west of Madison was rough and broken, and so not favorable to UHF propagation. (Id., pars. 7, 9).

(3) The population in these areas having only WISC-TV service was relatively scattered, without communities capable of supporting their own TV stations to replace deleted service. (Id., par. 7).

(4) The Madison area could not effectively be "deintermixed" by reallocation, since:

(a) Outside VHF stations provided recognized service to Madison's threshold, and served most of the Madison UHF's coverage area. (Id., par. 7).

(b) Channel 3 at Rockford would necessarily provide primary VHF service to Madison and almost all of the Madison UHF's coverage area. (Id., pars. 13-14).

(5) Madison, larger and with greater state and regional significance, had greater need for Channel 3, its *first* VHF, than did Rockford for its *second* VHF, under Section 307(b) of the Communications Act. (Id., par. 14).

(6) Reallocation would not improve and more likely worsen the competitive situation in Madison by bringing at least one powerful outside VHF service, straddling two markets, into that city and area. (Id., par. 15).

(7) Reallocation would not effectively improve Rockford's competitive situation by creating a different but still significant disparity between the coverage of Rockford's two stations that could be

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the rougher type of terrain found north and west of Madison, Petitioner has never challenged, nor does it here dispute, the Commission's factual conclusions on the engineering record of the Docket 11754 proceeding. (22 FCC 356, Pars. 9-10.)

eliminated only at the cost of further worsening the Madison competitive situation. (Id., par. 15).

Other Commission decisions on the respective records of the several reallocations proposals ran the range of possible results. These included, e.g., denial of proposals to delete or reallocate VHF channels (*Madison*, 22 FCC 332; *Hartford*, 22 FCC 356); denial of proposals to delete UHF channels in favor of adopting proposals for adding additional VHF channels to the cities (*New Orleans*, 22 FCC 396; *Albany-Schenectady-Troy*, 23 FCC 358); outright deletion and reallocation of VHF channels where not yet in operation (*Peoria*, 22 FCC 307; *Springfield*, 22 FCC 318); some preliminary indication of contemplated deletion of operating VHF channels with further proceedings designated to consider the matter, which are still pending today (*Evansville*, 22 FCC 382; *Fresno*, 22 FCC 365); and outright addition of more VHF channels without relation to the local UHF facilities (*Duluth*, 15 RR 1643; *Charleston*, 15 RR 1635).

Winnebago alone of the parties in the Madison-Channel 3 proceeding (Docket 11734) petitioned for judicial review of the Commission's decisions. Neither of the two Madison commercial UHF stations nor that city's educational UHF licensee did so. The court below unanimously sustained the Commission's action. Its affirmance was primarily grounded upon its earlier decision *en banc* in November, 1955 which had upheld the Commission's general denial of several proposals for "selective deintermixture" of VHF channels (including Madison Channel 3), and the Commission's refusal to "stay" VHF construction permits then

resulting from long-standing comparative hearings (again including Madison Channel 3) pending further administrative allocation proceedings. (*Coastal Bend Television Co.* v. *Federal Communications Commission*, 98 U.S. App. D.C. 251, 234 F. 2d 686 (1956).)

REASONS FOR DISALLOWANCE OF THE REQUESTED WRIT

The court below properly sustained the eminently proper and reasonable Commission decisions to retain the Madison Channel 3 allocation and not to reallocate the said Channel as proposed. The Commission's decisions were sound, consistent with controlling principles of frequency allocations set forth in the Communications Act of 1934, as amended, as well as its policies in pursuance thereof, and amply supported by the factual record in its proceeding Docket 11754. Where—as here—the administrative agency's decisions in an area peculiarly lying within its informed discretion have substantial record support, are clearly reasoned and lie within the bounds of permissible administrative judgment, the necessarily limited judicial review process properly did not interfere to substitute its judgment for that of the agency. (*National Broadcasting Company* v. *United States*, 319 U.S. 190; *Logansport Broadcasting Corporation* v. *United States*, 210 F. 2d 24 (U.S. App. D.C., 1954); *Coastal Bend Television Co.* v. *F.C.C.*, 234 F. 2d. 686 (U.S. App. D.C., 1956); *Rochester Telephone Corp.* v. *U. S.*, 307 U.S. 125, 146 (1939)).

No justiciable issue is raised by petitioner requiring or warranting the grant of the extraordinary relief urged. The substantive legal issue that is raised by the petition (i.e., respondent's question # 1) is

wholly comprehended within the matter of judicial review of an agency's discretionary determination. As the proponent of a change in the rule providing for a channel allocation in which it held no right or interest, petitioner clearly received all of (and actually more than) the procedural rights before the Commission to which it was entitled. (Administration Procedure Act, Secs. 4, 6(d)). The Commission's proceeding provided it proper notice, a more than ample opportunity to file comments and reply comments, and a final decision which properly detailed the basic facts and rational conclusions therefrom, and did so to such a degree as not only to meet all pertinent statutory requirements for rule making but to transcend such requirements and approach the level of the procedures required for adjudicatory hearings on applications. (*Johnston Broadcasting Company* v. *Federal Communications Commission*, 175 F. 2d 351 (U.S. App. D.C., 1949)).

Any basic procedural or substantive questions as might be raised concerning the Commission's actions (such as its statutory power to selectively deintermix particular channels or the legality of its procedures for considering such reallocations), are properly applicable only to existing licenses such as respondent Radio Wisconsin whose rights were threatened with direct invasion and extinction, rather than to mere proponents of rule making changes such as petitioner. No such questions are, however, raised by the instant petition. Finally, petitioner's procedural allegations are (with one minor exception not here urged by it[1])

[1] That one involved the Commission's holding untimely a late-filed Winnebago proposal for a wholly new aspect in the about-to-be-terminated proceeding. (R. 801). Such agency determination

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fatally defective in not having been asserted before the Commission so as to provide the agency with the statutorily required opportunity to pass upon them,[1] nor contained in Winnebago's petition for review to the court below, and so not properly before that court for review. (Section 405 of the Communications Act of 1934, as amended; *O'Neill Broadcasting Company* v. *Federal Communications Commission*, 241 F. 2d 443 (U.S. App. D.C., 1956); *Democrat Printing Co.* v. *Federal Communications Commission*, 202 F. 2d 298 (U.S. App. D.C., 1952); Section 4 of the Judicial Review Act of 1950; *Stuart* v. *Federal Communications Commission*, 105 F. 2d 788 (U.S. App. D.C., 1939); *WOKO, Inc.* v. *Federal Communications Commission*, 109 F. 2d 665 (U.S. App. D.C., 1939)).

Petitioner's reliance upon the decision in *Chenery Corp.* (318 U.S. 80) is wholly misplaced and provides no support for its novel and fallacious theory as to the individual Commissioner's voting in the several reallocations decisions and their reasons therefor. The Commission's Madison Channel 3 decision stands upon and is amply supported by the public interest facts

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respecting its own processes is properly sustained on review except for the most extraordinary circumstances not here present. (*Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949)); *Shein et al.*, v. *United States*, 102 F. Supp. 320 (1951), Aff. (per curiam) 343 U.S. 944 (1952)).

[1] In fact, petitioner took the wholly contrary view before the Commission that only bare rule making proceedings were involved, as demonstrated by its admonitions in Docket 11754 that "Rule making proceedings such as this are not adversary proceedings which may turn on niceties of procedure . . ." (R. 809), or that it was " . . a rule making proceeding in which the Commission is not limited solely to the specific record herein made . . ." (R. 391).

and conclusions enunciated by the agency therein—precisely in the manner required by this Court's *Chenery* decision. It is petitioner who would do violence to the *Chenery* principle by going wholly outside of the grounds asserted and relied on by the agency, in an attempt to invalidate the Madison Channel 3 decision on the basis of an individual Commissioner's dissent on a narrow legal ground, in a wholly separate proceeding (involving Fresno Channel 12) in which a diametrically opposite result was reached on its own separate factual record. If the Madison Channel 3 decision were *arguendo* grounded on what the petition inferentially asserts was an erroneous application of a statutory (Section 307(b)) requirement, petitioner has had ample opportunity to seek judicial review thereof. It here, however, fails to do so. The court below having sustained the Commission on this matter of Section 307(b), and petitioner not having directly urged this to be error as a basis for issuance of the requested writ, it should not be permitted to raise this matter in the indirect and circumlocute manner here attempted.[1] Furthermore, that individual Commissioners *arguendo* may not be in general agreement upon the complex legal, policy and factual matters relevant to channel reallocations provides no ground for the assertion of

[1] Without attempting a detailed exposition of this matter, it may be noted that there is little, if any, warrant for petitioner's allegation that denial of the proposed Madison Channel 3 reallocation on the basis of a traditional application of Section 307(b) would have clearly been erroneous. Certainly there are the strongest grounds for upholding the Commission's conclusion that Madison, the capital and central city of Wisconsin, deserved its *first* long-range VHF facility pursuant to Section 307(b) before the smaller and relatively less significant city of Rockford (Ill.) deserved its *second* VHF. (22 FCC, par. 14)

this Court's extraordinary review power. Particularly is this so respecting the instant petition which raises no questions whatever concerning such matters.

Petitioner's generalized and conclusionary (and often factually inaccurate) allegations as to a basic lack of harmony in the Commission's several reallocations decisions, are unfounded, unmeritorious and provide no effective basis for the relief requested. The petition is here comprised of a melange of factual inaccuracies,[1] unsupported conclusions,[2] and bare and superficial comparisons between several agency decisions and hearing records that are not before this Court for review. Such defects are so pervasive that the petition here does not reach the level of rational argument in support of a credible thesis deserving of substantial consideration by this Court. While respondent spelled out to the court below the manner in which the several agency decisions were in essential harmony (each reflecting the application of general criteria to the particular facts there respectively presented), it does not believe such a detailed showing

[1] Thus, for example, petitioner (footnote 1(b), page 13) refers to placing Channel 3 "on ice" (i.e., total non-use) although such matter was never raised by it before the Commission nor in its petition for review to the court below. Furthermore, the Vail Mills Channel 10 decision referred to was soon thereafter reversed by the Commission and that frequency is now in use in that city (23 FCC 358), and Elmira Channel 9 was *not* placed "on ice" as alleged, but the Commission merely preferred to leave the choice as to the city to which it would be reallocated to a later proceeding. (22 FCC 307, 313-5.)

[2] Thus, for example, petitioner's reference (footnote 1(c), page 10) to certain evidence being "no more persuasive than comparable evidence" in six other proceedings, is an allegation wholly unsupported by factual documentation and is in fact incorrect.

to be required or warranted here in light of the wholly haphazard and ineffectual manner in which petitioner herein attempts to raise such issue. Suffice it to note that petitioner's defective technique in no way directly challenges the Commission's Madison Channel 3 decision nor the hearing record which supports it.

Petitioner's final reliance for issuance of the requested writ is on an equally unmeritorious ground in which it attempts on unpersuasive bases to place the instant matter within the ambit of this Court's October 20, 1958 decisions in *WIRL Television Co.* v. *United States,* and *Sangamon Valley Television Corp.* v. *United States,* in which judgments of the court below were vacated. (Cases 235 and 242, respectively.) It seems clear that this Court's decisions in those cases rested upon information as to some reference in Congressional hearings to alleged *ex parte* presentations to individual Commissioners in the *Springfield* (Ill.) case, and the close inter-relationship thereof with the *Peoria* (Ill.) case, those two being closely intertwined in the Commission's own decisions and relatedly being the only two cities in the entire United States in which long-allocated VHF channels had been deleted in order to insulate UHF stations in the communities from competition.

The instant Madison Channel 3 proceeding, however, is distinct and unique in and of itself. This is true not only on the indigeneous facts and circumstances of the separate record in its separate proceeding (Docket 11754), but also insofar as Madison Channel 3 has an allocations history unlike that of any other city in the United States. This Madison proceeding is and was totally devoid of any such *ex parte*

presentations, or even the slightest hint thereof. None are charged by petitioner, and (to the best of respondent's knowledge) no references whatever of any such are found on the record of the Congressional hearings. The Madison-Channel 3 decision, involving the retention of an existing and operative VHF facility located in another part of the country, is not related to any degree to the Peoria or Springfield matters beyond the bare factor that separate proceedings to consider the possible case-by-case application of a general agency policy were held respecting each. This Court having vacated the *WHRL* and *Sangamon* judgments below on grounds other than their merits, the below court's *en banc Coastal Bend* decision remains the controlling rule of law respecting judicial review of Commission actions denying proposals for reallocation. That principle clearly calls for affirmance of the Commission and the appellate court herein.

Nor should *certiorari* lie here, as petitioners contend, solely because the vote of a since-resigned Commissioner was part of the agency's 4-3 majority below. No basis therein is shown, or even alleged in the slightest, to invalidate or in any way cast adverse reflection upon such Commissioner's participation in the Madison-Channel 3 proceeding. There being neither evidence nor imputation of anything wrongful, to accede to petitioner's request here would be to adopt an indiscriminate and disruptive rule of law serving no responsive public purpose.

That the Commission, whatever its changing component membership, has consistently upheld and retained the Madison Channel 3 allocation against

proposals for reallocation is demonstrated by the following *seriatim* reference to the *six* instances over recent years in which reallocation thereof has been considered and rejected:

1. Allocation of Channel 3 at Madison, after rejecting proposals to reserve it for education. (*Sixth Report and Order*, supra; April 14, 1952.) (Commissioners Walker (Chairman), Hyde, Webster, Sterling so voting; Commissioners Hennock and Jones dissenting; Bartley not participating.)

2. Denial of petition for reconsideration of Madison-Channel 3 aspect of Sixth Report and Order. (*Radio Wisconsin, Inc.*, 8 RR 323; Sept. 22, 1952.) (Commissioners Hyde, Webster, Sterling and Bartley so voting; Walker (Chairman) and Hennock dissenting; Jones not participating.)

3. Denial of further petition for reconsideration of Madison-Channel 3 aspect of Sixth Report and Order. (*Radio Wisconsin, Inc.*, 8 RR 467; Oct. 31, 1952.) (Commissioners Hyde, Bartley, Sterling, Merrill, Webster so voting; Walker (Chairman) and Hennock dissenting.)

4. Denial of proposal to institute rule making proceedings for reallocation of Madison Channel 3. (FCC-54-1355, November 1, 1954.) (Commissioners McConnaughey (Chairman), Hyde, Webster and Lee so voting; Bartley dissenting; Hennock and Doerfer not participating.)

5. Denial after hearing of proposals to reallocate Madison Channel 3 (FCC Dockets 11335 et seq.), as part of a group of pilot proceedings respecting possible reallocations. (13 RR 1511, November 10, 1955.) (Commissioners McConnaughey (Chairman), Lee, Mack, Doerfer, and Webster so voting; Hyde and Bartley dissenting.)

6. Denial after hearing of instant proposals to reallocate Madison Channel 3. (Docket 11754—22 FCC 332, February 26, 1957; 23 FCC 53, June 20, 1957.) (Commissioners McConnaughey (Chairman), Doerfer, Mack and Craven so voting; Hyde, Lee and Bartley dissenting.)

CONCLUSION

The decision of the court below being clearly correct and no question calling for further review by this Court properly being raised, the instant petition for writ of *certiorari* should be denied *en toto*.

Respectfully submitted,

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